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U.S. Citizenship and Immigration Services

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[redacted]

MAR 25 2005

FILE: WAC 03 086 50115 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center. On appeal, the Administrative Appeals Office (AAO) remanded the matter back to the director. The AAO ordered that any decision adverse to the petitioner should be certified to the AAO. The director issued a new decision denying the petition but did not properly certify the decision to the AAO. On February 3, 2005, the AAO advised the petitioner that it was certifying the director's decision to itself and afforded the petitioner 30 days in which to supplement the record. The petitioner's response has been incorporated into the record. The director's decision will be withdrawn in part and affirmed in part. The petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a volleyball coach. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

The director initially determined that section 203(b)(2) of the Act did not apply to aliens of exceptional ability in athletics. Based on a 1995 legal opinion, the AAO concluded that the classification sought does apply to athletes and remanded the matter to the director for a determination as to whether the petitioner had demonstrated exceptional ability and whether a waiver of the job offer was in the national interest. The director found that the petitioner did not qualify for classification as an alien of exceptional ability and had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

For the reasons discussed below, we find that the petitioner has demonstrated exceptional ability as an athlete, most persuasively in the 1980s, but that the proposed benefits of her intended employment as an assistant coach for a small college do not warrant a waiver of the job offer requirement in the national interest.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims to meet the following criteria.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The director determined that the petitioner meets this criterion and we concur with that determination.

Evidence of membership in professional associations

Counsel asserts that the petitioner's membership on national volleyball teams is comparable evidence to meet this criterion pursuant to 8 C.F.R. § 204.5(k)(3)(iii). The director concluded that an athletic team is not a professional association and noted that the petitioner is no longer a member of a national team. In rebuttal, counsel notes that the membership criterion for exceptional ability is less exclusive than the similar criterion for aliens of extraordinary ability pursuant to section 203(b)(1) of the Act.

From 1990 to 1999, the petitioner played with four different Turkish professional volleyball teams. The last team she played with was a finalist in the Turkish Cup. In 1986 and 1987, the petitioner played on the Women's Volleyball Team of China, which won first place in the World Championships in 1986 and first place in the Asia Championships in 1987. All female athletes who win the Asian Games Championship receive the title "Master Sportswoman."

We concur with the director that athletic teams are not professional associations. Counsel, however, asserted that the petitioner's national team membership constituted comparable evidence to meet this criterion. The director failed to consider that argument. We find that this criterion is not applicable to the petitioner's field. We further find that playing for a national team is indicative of a degree of expertise significantly above that ordinarily encountered. Thus, the petitioner's team membership is comparable evidence to meet this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The director concluded that the petitioner had garnered "some" recognition for achievements in the field. We agree that the petitioner's championship medals awarded in 1986 and 1987 and her designation as a "Master Sportswoman" by the Chinese government satisfactorily meet this criterion.

For the reasons stated above, we find that the petitioner has established exceptional ability as an athlete. This classification normally requires a labor certification from the Department of Labor. The petitioner seeks a

waiver of this requirement in the national interest. The evidence of exceptional ability significantly diminishes after 1987 and ends in 1999, more than three years prior to the filing date of the petition. Unlike the extraordinary ability classification, exceptional ability does not require "sustained" ability. Nevertheless, the lack of more recent evidence of exceptional ability as an athlete and the lack of evidence of exceptional ability in coaching is a valid consideration as to whether the waiver of the job offer requirement is in the national interest.

Neither the statute nor CIS regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to CIS regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N 215 (Comm. 1998), has set forth several factors that must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, volleyball coaching. The director concluded that the proposed benefits of her work would not be national in scope. In rebuttal, the petitioner submits a letter from her former coach, now Head Coach of the U.S. Women's National Volleyball Team, [redacted] Ms[redacted]sserts that China has a very strong volleyball program and that the petitioner will bring this type of expertise to the National Association of Intercollegiate Athletics (NAIA) league as an assistant coach at Fresno Pacific University. M[redacted]sserts that prior to the recent establishment of a professional volleyball league, the U.S. Olympic team recruited from the NCAA league and the NAIA.

Finally, [redacted] serts that the petitioner will utilize her "connections to China" to recruit Chinese players and coaches to the United States.

In considering this issue, we will not favor one business or team over another. Specifically, it is not in the national interest that one particular college have a winning volleyball team by recruiting seasoned foreign players as student athletes. Setting aside whether it is credible that the petitioner has current Chinese expertise and connections after leaving Chinese volleyball in 1987, the record does not establish that the position sought, assistant coach at Fresno Pacific University, would have a national impact. The petitioner has not submitted evidence that NAIA volleyball players have gone on to compete on the U.S. Olympic team to a greater degree than players at NCAA schools, a league typically associated with the highest level of collegiate athletics.

Even if we accepted that the proposed benefits are national in scope, the petitioner must demonstrate that she will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof.

First, the director's concerns regarding the inconsistencies in the record regarding the petitioner's intended degree were valid. Nevertheless, the petitioner has now submitted her course registration for spring 2005 and final grade report for fall 2004. Each semester reflects three physical education classes, including a senior practicum in that area. Thus, the petitioner has now provided objective evidence demonstrating her pursuit of a degree in Physical Education.

As mentioned above, however, the petitioner has not played volleyball in China since 1987. As such, it is not credible that she possesses the latest Chinese expertise in that sport or that she has noteworthy contacts with Chinese coaches and players. While the petitioner participated as a trainer for Turkish youth and junior teams from 1993 through 2001, the record contains no evidence of how these teams performed under her tutelage. The petitioner now submits a letter dated attesting to the petitioner's work as a coach at a camp in the summer of 2003, after the date of filing. This evidence does not relate to the petitioner's eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Regardless, the petitioner has not established that the students she coached competed successfully. Thus, the petitioner has not established a track record of success as a coach.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The petition is denied.